No. 10,095

In the United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, Appellant,

-vs-

B. W. ALEXANDER, BECKWITH MERCANTILE COMPANY, a Montana Corporation, JOHN A. HAZEL, THEODORE KNUTSON and EDNA I. KNUTSON, his wife, P. W. SORENSON, AVERY A. STEVENS, MEIL C. PIERCE, BERT LISH, BERT MYERS NELSON, JOHN ELLIS, J. A. McKEEVER, AXEL ERICKSON, JOHN MINESINGER and ADA B. MINESINGER, his wife, and THOMAS WALD,

Appellees,

and

FLATHEAD IRRIGATION DISTRICT, a corporation, and DENNIS A. DELLWO,

Appellants,

-vs-

B. W. ALEXANDER et al,

Appellees.

Reply Brief of Appellants, Flathead Irrigation District and Dennis A. Dellwo

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MISSOULIAN

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SUBJECT INDEX

CASES CITED

At the outset these appellants point out that appellees' brief makes no attempt to meet appellants' argument upon the question presented (our brief p. 16): "Do the defendants have any right to take their water regardless of amount, except as delivered by the Project Engineer?"

The complaint in intervention alleged (R. 68):

> "That the defendants, and each of them, have taken the amounts of water taken by them without regard to the officers in charge of the Flathead Irrigation Project, and have assumed to take such water as they deemed proper at such times and at such places as they deemed proper."

This complaint prayed (R. 80):

> "That it be adjudicated and decreed that the defendants have no right to take said waters apart from the deliveries made to them by the agents of the United States in charge of said Flathead Irrigation Project, and that the said defendants be restrained from taking any water to which they may be entitled except as the same is delivered to them by the agents of the United States in charge of the Flathead Irrigation District."

Our brief, page 15, pointed out the evidence, wholly uncontradicted, which showed the wasteful and injurious results of the acts of the defendants in helping themselves to water without reference to the Project Engineer, who was appointed by the Secretary of the Interior as water commissioner to distribute these waters. These appellants consider the correction of the intolerable conditions resulting from this unregulated and unmeasured use the most important relief sought by them as interveners. Upon this aspect of the case appellees say nothing.

Appellees content themselves with arguing (1) that the court below was without jurisdiction for want of essential

parties, and (2) that the rights of the appellees are to be calculated on the assumption that each irrigable acre of the land originally allotted to Indians, is entitled to a sufficient amount of water to properly irrigate it, before surplus unallotted lands are entitled to any water.

The question of jurisdiction has been covered in our original brief. But as to point (2), above, it should be pointed out, perhaps more fully than was done in our main brief, pp. 26-27, that even if the rights of appellees were as argued by them, still they have taken, and insist on taking, more water than they are entitled to.

As appears from lines 8 and 9 of Exhibit 19 (R. 401) if Indian allotments alone are to be supplied, the average amount of water which it would be possible to deliver would be 2.16 acre feet per acre. This figure includes the water saved or created by storage or pumping. As against this, the defendants on the McDonald-Deschamps ditch were helping themselves to 4.32 acre feet per acre, exactly twice as much, and those on the Magee-Minesinger ditch were taking 8.12 acre feet per acre.

The true disparity is even greater. For surely defendants can claim no share in stored and pumped water, for which they will pay or contribute nothing. (Appellees omit discussion of the question of the stored water). And if the stored water be not considered, the whole of the Indian allotments in the Mission Valley Division would have an average of only 1.34 acre feet per acre. (Exhibit 19, R. 401).

Thus in any event, on any theory of defendants' rights, and notwithstanding anything stated in appellees' brief, they have not only helped themselves to water, they have helped themselves to excessive quantities, and in this suit

claim their right to continue such use. Clearly they should be enjoined not only from helping themselves, but also from taking these excessive quantities.

The exact measure of defendants' rights becomes important only when the court comes to consider, not whether an injunction should issue, but the specific terms of the injunction. (See our brief, p. 27).

Upon this question appellees go far afield by arguing: (1) The waters were reserved by treaty to individual Indians, not to the tribe; (2) that therefore each allotted Indian (as well as these appellees as successors to Indians) acquired a vested right to sufficient water to irrigate his land.

It is submitted that the argument is a mere play on words, and does not touch the controlling question here. The rules governing these waters were stated by this court in *United States* v. *McIntire,* 101 F. (2d) 650, at p. 653, as follows:

> "The waters of Mud Creek were impliedly reserved by the treaty to the Indians. Winters v. United States, 207 U. S. 564, 577, 28 S. Ct. 207, 52 L. Ed. 340; United States v. Powers, 9 Cir., 94 F. 2d 783, 785, and cases cited. The United States became a trustee, holding the legal title to the land and waters for the benefit of the Indians. Minnesota v. Hitchcock, 185 U. S. 373, 387, 22 S. Ct. 650, 46 L. Ed. 954. Being reserved no title to the waters could be acquired by anyone except as specified by Congress."

Appellees argue at great length that the words "reserved by the treaty to the Indians," mean, to the individual Indians, not to the tribe. Such an argument solves nothing. It is clear that the word "Indians," whether it refers to individuals or tribe, means "all the Indians." That is what this suit is about. It is a suit designed to find out whether

these few appellees, almost entirely white purchasers from a few Indians, shall remain in a position to help themselves to quantities of water far in excess of that available to Indian owners and to other purchasers from Indian allottees, like the appellant Dellwo. We seek here to redress inequalities, and we do it, not in the name of any "tribe" as distinguished from "individual Indians." Dellwo is likewise a successor of an "individual Indian." As for him, he says that when this court used the words "reserved by the treaty to the Indians," it meant "all the Indians."

> "After the lands and waters were reserved to the Indians as individuals, then when the United States accepted the trust for all of the individuals the right of each Indian as a beneficiary was necessarily limited and restricted by the correlative right of other individual Indians, and the United States in the discharge of its duties as trustee was necessarily obliged to take such action as would provide the greatest good for the greatest number."

One reading appellees' brief about "individual Indians" having "vested" rights by virtue of the treaty of 1855, might even assume that appellees were arguing that such treaty created in Duncan McDonald and Frank Fiddler and Edward Deschamps and their other predecessors specific rights to the waters of Post Creek. But of course neither McDonald nor Fiddler nor Deschamps, nor any of their predecessors, had any better right to those waters than all the other Indians of the tribe.

The Flathead people were not living upon the present reservation at the time of this treaty. They were living in the general area of the Bitter Root Valley in Montana. This is shown by the terms of the treaty itself. In Article 2 of the treaty the Indians agree to move to the reservation

within one year after the ratification of the treaty. The treaty further provided for the appraisal of the improvements of the Indians who, on moving, had to abandon the same. It also contains a provision for the payment of certain money to compensate the Indians for moving to the reserved land. The treaty of 1855 did not definitely fix the reservation at least so far as the Flatheads were concerned. Article II of the treaty provided that if upon a survey it should be decided that the Bitter Root Valley was better suited to the needs of the tribe than the general reservation then portions of the Bitter Root should be set aside as a reservation. The question was not settled until the proclamation of President Grant in 1871.

Northern Pac. R. Co. v. Maclay, 61 Fed. 554.

Northern Pac. R. Co. v. Hinchman, 53 Fed. 523.

Surely no one will argue that any particular one of these Indians, none of whom lived even near to the lands or stream in question, acquired, by the treaty, any greater rights than the other Indians of the tribe.

Nor do appellees enlighten the court by calling their rights "vested."

If one has a right of course it is vested. The question is, rather, what is that right? But the right of these appellees, as well as of "all the Indians" of the Reservation, was as stated in the language of this court quoted above. (101 F. 2d. 653):

> "The United States became a trustee, holding the legal title to the land and waters for the benefit of the Indians."

This defines the rights of all the Indians. It defines the rights of Dellwo and of the hundreds of water users in his

position. It defines the rights of appellees. Their rights are to have this trust carried out. The question is was this trust breached?

Of course these few appellees, located on lands close to Post Creek, where water can be brought to them with a minimum of constructed works, would prefer to see the United States simply do nothing, thus allowing them to monopolize these waters. But the United States has intervened, and by the expenditure of over eight million dollars (R. 372), made water available not merely to those few allotments immediately adjacent to the streams, but to a very large number of allotted lands, which, like those of Dellwo, would have no opportunity to obtain water were it not for this government distribution system (R. 460). This was done so that "all the Indians" might be served, and in accordance with the policy of the greatest good for the greatest number.

Some of the benefits of this government project were therefore:

1. Water was made available for lands of "all the Indians," including those too remote from streams to build their own ditches. (R. 460).
2. The total supply in the irrigation season was augmented by 98,000 acre feet of stored water, (which was 38 percent of the whole supply, R. 229) (R. 392, 221) accumulated in reservoirs from winter and early spring run-off, which would otherwise be lost, and from pumping from sources which would otherwise be unavailable. (R. 390, 392, 219).
3. Water was rotated among users thus accomplishing

a saving in the use of waters impossible without the government controls (R. 406, 408).

4. The central control system made it possible (a) to ascertain from year to year what is a *pro rata* distribution, (R. 410) and (b) to make an orderly division of the waters. (R. 411, 462).

To bring the surplus unallotted lands likewise within the project was not a breach of trust by the United States. Not only were these lands thus made saleable at the Indian price, but, as pointed out in the Brief for the United States, (pp. 10, 11) the proceeds of their sale were first used for the construction of the system and later paid to the Indian tribe. Inclusion of these additional lands provided just that many more landowners to share in construction and operation costs. Indeed, the stored and pumped water alone may well be sufficient to supply these unallotted lands.

Surely this court cannot say that in constructing this system as it did, and including these surplus lands to provide additional contributors to the construction and operating costs, the United States brought about a result which, all things considered, deprived the Indians as a whole of that which they might otherwise have had. Indeed it may well have appeared to Congress at the time the system was set up, that a comprehensive system such as this would not prove feasible without including the unallotted lands. If it requires a mile of ditch to reach three Indian allotments, surely it is not unreasonable to include for service from the same ditch two unallotted units which are traversed within the same mile and which can thus contribute to the common cost.

The conclusion is that since the defendants were, regardless of all other considerations, helping themselves to excessive quantities of water, refusing to install measuring devices or to submit to any controls, the court below erred in refusing the injunction prayed for by intervenors. And if and when it becomes necessary for the court, in order to make its injunction specific, to define the rights of the parties, its conclusion should be that the government's system has been well calculated to benefit all of the beneficiaries of its trust, that such trust has not been betrayed by the inclusion of unallotted lands, and that defendants' rights must be determined accordingly.

Respectfully submitted,

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